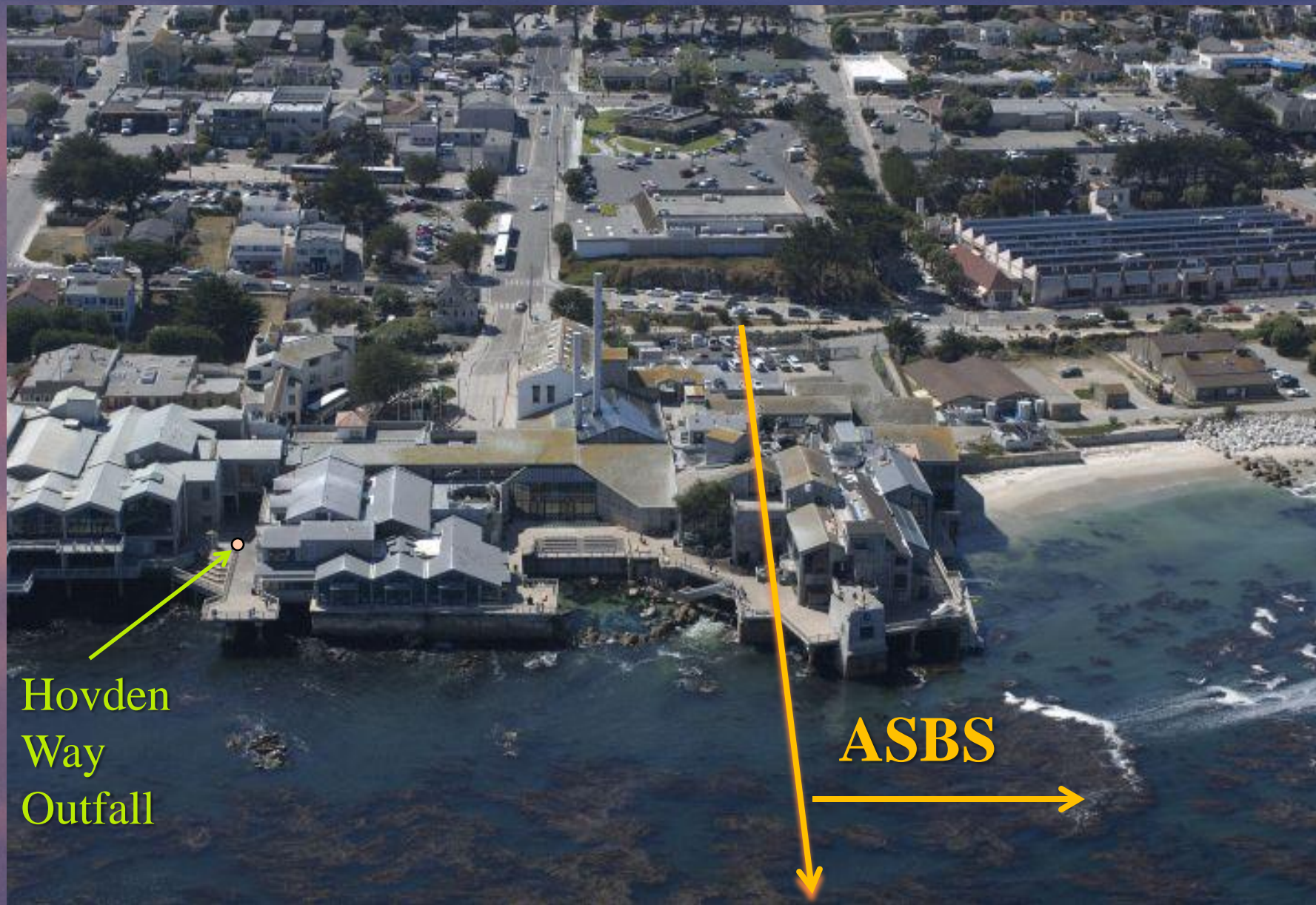


**MARCH 20, 2012  
ADOPTION HEARING**

**GENERAL EXCEPTION TO THE  
CALIFORNIA OCEAN PLAN WASTE  
DISCHARGE PROHIBITION for  
SELECTED DISCHARGES INTO AREAS  
OF SPECIAL BIOLOGICAL  
SIGNIFICANCE including  
SPECIAL PROTECTIONS, and FINAL  
PEIR**

**ALAN WALTNER – LAW OFFICES OF ALAN WALTNER  
COUNSEL FOR THE CITY OF MONTEREY**





Source: Copyright (C) 2002-2009 Kenneth & Gabrielle Adelman, California Coastal Records Project,  
[www.Californiacoastline.org](http://www.Californiacoastline.org)



## *CEQA – Requirement of an “Accurate, Stable and Finite” Project Description*

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- "An accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR." County of Inyo v. City of Los Angeles (3d Dist. 1977) 71 CA3d 185, 193
- The EIR's 2-page project description simply references the general exception and special protections
- By including Monterey (without explanation) as the only “upstream” or “nearby” source, the project description is ambiguous since it is not clear whether other similarly situated sources will also be subject to the special protections
- As a result, the scope of the required control measures and resulting environmental effects cannot be evaluated

# *Key Changes to the Special Protections Have “Shifted” the Project Description*

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- New Sections 1.A.2.h.(5) and I.B.2.c.(5): “[c]ompliance with this section does not excuse violations of any term, prohibition, or condition contained in these Special Protections.”
- Response to Comment: “The new language makes clear that compliance with the iterative process set forth in Sections 1.A.2.h and 1.B.2.c does not preclude enforcement where the discharger is causing or contributing to an alteration of natural water quality. The iterative process provided in the Special Protections is analogous to that set forth in storm water permits. While stated more directly, this language is consistent with the State Water Board’s position on the iterative process in MS4 permitting. Courts have determined that engagement in the iterative process pursuant to an MS4 permit does not provide a “safe harbor” from liability for violations of permit terms prohibiting exceedances of water quality standards.” March 9, 2012 Response 109
- These changes have dramatically shifted the program, potentially to require “whatever it takes” to achieve natural water quality



# *The “Natural Ocean Water Quality” Reference Site Approach is Inherently Vague and Shifting*

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- A 2010 report of the ASBS Scientific Panel recognizes that “truly natural water quality probably does not now exist . . . .”
- Deferring the determination of the ultimate compliance standard precludes effective analysis of the environmental effects of the program under CEQA
- Removing of the term “waste” from the discharge prohibition suggests a “one molecule” approach
- The key question is whether relatively low-impacting BMPs will be sufficient, or whether more will be required

## *The EIR Clearly Assumes that only BMPs will be Required*

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- “State Water Board staff has identified a variety of measures and potential impacts of those measures for dischargers to use to be in compliance with the proposed exception. If a discharger decides to use methods that are detrimental to biological resources (i.e., end-of-pipe projects along the Monterey Peninsula) rather than the less offensive BMPs identified in the DPEIR then the discharger will be responsible for identifying and mitigating the impacts associated with those methods.” February 17, 2012  
Response 66



# *The Project Description has been Piecemealed*

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- “‘Project’ means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment . . . .” CEQA Guideline Section 15378
- “Discharge Limitations . . . Implementation requirements for discharges to ASBS which have been approved by the State Water Board are enforceable under this Order.” June 7, 2011 Draft Phase II MS4 Permit
- “The State Water Board . . . [d]irects staff to consider development of, and make recommendations for, an Ocean Plan amendment to address storm runoff into ASBS, during the next triennial review period.” Draft Resolution Page 3
- The combined effects of these connected actions have not been evaluated under CEQA

# *Porter Cologne Act – Reasonableness, Beneficial Uses, Economic Considerations*

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- The ambiguities in the program also preclude the required analysis under the Porter Cologne Act
- 13263 – discharge limitations must “take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, and the provisions of Section 13241.”
- 13241 – water quality objectives must consider beneficial uses, existing water quality, water quality conditions that could reasonably be achieved, and economic considerations
- By reference, the special protections appear to be intended to be incorporated as discharge limitations into the Phase II permit
- The required analysis has not been performed
- The analysis requires a clear picture of the discharge limitations and/or water quality objectives



# *The Porter Cologne Act and CEQA Require Evaluation of the True Impacts*

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- The economic and other effects of requiring “whatever it takes” to achieve “natural water quality,” rather than limiting the discharge prohibition to “*waste*” and the compliance efforts to *BMPs* (or enhanced *BMPs* through the iterative process), have never been evaluated under Sections 13263 and 13241 of the Water Code
- The environmental impacts of this dramatically broad project scope are not addressed by the current EIR
- This is particularly true if “upstream” contributors or nearby dischargers are included in a “whatever it takes” mandate

# *Conclusion*

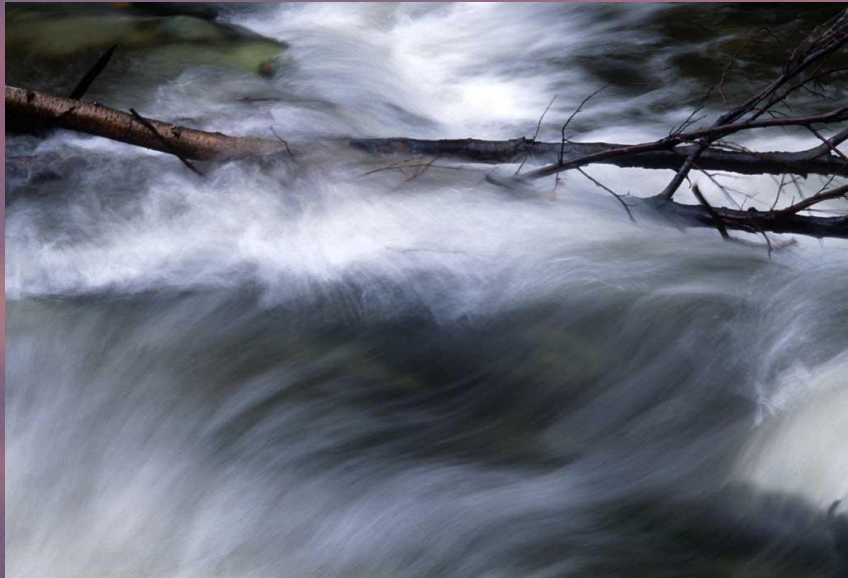
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- The EIR is seriously deficient in numerous respects, as detailed by commenters
- The responses to comments have only addressed a small fraction of those deficiencies, and have avoided all of the tough questions by inaccurately restating or ignoring comments
- The ambiguities in the program description all contribute to the CEQA and Porter Cologne Act violations:
  - ambiguous treatment of “upstream” or “nearby” sources
  - inherently uncertain nature of the reference site approach
  - elimination of the “waste” qualifier – “one molecule?”
  - failure to evaluate control measures beyond simple BMPs,
- The EIR clearly does not evaluate the indirect effects of doing “whatever it takes” to achieve “natural ocean water quality”



# *Contact Information*

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